In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 929

JOHN ROBERT TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 416 F. 2d 16.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1969. The Chief Justice extended the time for filing a petition for a writ of certiorari to December 7, 1969, and on December 8, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

376-291—70

QUESTIONS PRESENTED

1. Whether petitioner was denied effective assistance of counsel.

2. Whether the trial court properly denied petitioner's motion for judgment of acquittal.

3. Whether the court erred in its instructions to the jury.

4. Whether petitioner had an absolute right to receive a copy of a probation report.

5. Whether the court of appeals properly ruled on petitioner's appeal without oral argument.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Virginia of transporting in interstate commerce a security valued in excess of $5,000 which had been procured by fraud, in violation of 18 U.S.C. 2314. After a correctional study pursuant to 18 U.S.C. 4208(b), petitioner was sentenced to five years' imprisonment under the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (R. 149). The court of appeals affirmed the conviction *per curiam* (Pet. App. 1a).

The evidence showed that petitioner was associated with the Tucker Corporation and the International Development Corporation, both of which engaged in real estate management. On September 1, 1967, petitioner drew a check for $69,990 on a Virginia bank

account of Tucker Corporation (R. 22). The same day, he deposited this check in another Virginia bank account of Tucker Corporation (R. 28, 34). Immediately after the Labor Day weekend, petitioner drew a check based upon this deposit, and purchased a cashier's check for $69,945.83, made payable to himself, which he admitted transporting to Maryland (R. 38–42). There petitioner negotiated this check to the International Development Corporation for deposit in a Maryland bank (R. 49). This deposit was used to cover a check for $69,000 previously issued by the International Development Corporation as down payment on an apartment complex that petitioner had agreed to purchase (R. 53–54, 76, 95). At no time were there funds available to cover any of the described transactions. Petitioner's defense was that the requisite fraudulent intent was lacking since he thought there would be funds available through a $50,000 bank loan and $19,000 he was to receive through his father-in-law (R. 72).

ARGUMENT

1. Petitioner contends that his defense counsel failed to adduce evidence of his mental illness which was available at the time of trial. But petitioner does not suggest what evidence might have existed. The only medical information apparently available to counsel concerning petitioner's mental state arose as a result of private psychiatric examinations conducted at the behest of petitioner's family two weeks after trial. The report of these examinations, which counsel

submitted to the court at a pre-sentence hearing, is ambiguous as to petitioner's mental condition both at the time of the offense and at trial. In all events, it would be reasonable to assume that, if petitioner had a history of psychiatric problems, petitioner or his family would have revealed this to his counsel. In the absence of such a disclosure, not alleged here, or any other showing from the record of reasonable cause to believe petitioner was unable to form the required statutory intent, counsel cannot be said to be ineffective.

2. Petitioner argues that the cashier's check described in the indictment and in the government's proof was not within the purview of 18 U.S.C. 2314 because drawing a check in one's own name is not forgery. Petitioner, however, was not charged with transporting "falsely made, forged, altered, or counterfeited securities" under the third paragraph of 18 U.S.C. 2314. He was charged, under the first paragraph of that section, with transporting a cashier's check in the amount of $69,945.83 (a security under 18 U.S.C. 2311) "knowing the same to have been * * * taken by fraud." The cashier's check was taken by fraud if, as the jury found, petitioner obtained it knowing that he had no funds to procure it.

3. Petitioner contends that the trial court erred in not explaining to the jury the difference between direct and circumstantial evidence. There was no reason to do so in this case. See *Holland* v. *United States*, 348 U.S. 121, 140. In addition, the court repeatedly

admonished that petitioner was entitled to every presumption of innocence respecting the various elements which the government had to prove beyond a reasonable doubt (R. 118–124).[1]

4. Petitioner claims that the trial court erroneously denied him access to a probation report. It does not appear that petitioner ever requested disclosure of such a report, or to which report petitioner refers.[2] In all events, under Rule 32(c), F.R. Crim. P., petitioner had no absolute right to all or even part of such a presentence investigation report.

5. Finally, petitioner contends that the court of appeals may not dispose of an appeal without oral argument unless by agreement of the parties. The procedure followed by the Fourth Circuit here is similar to that adopted by Rule 18 of the Rules of the Fifth Circuit; the validity of this procedure was questioned, and defended in our brief in opposition, in *Ambers* v. *United States,* No. 799, this Term. It is not a denial of due process to decide an appeal on the briefs when the court finds the issues sufficiently clear as not to require oral argument.

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[1] There is no merit to petitioner's contention that the trial court should have related to the jury the defense counsel's explanation and clarification of petitioner's testimony concerning an expected loan of $19,000 from his father-in-law. The jury's function was to determine the facts on the testimony.

[2] From the record, it appears the court had a report at the initial sentencing and a later report, made pursuant to 18 U.S.C. 4208(b), when final sentence was imposed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MICHAEL G. KELLY,
Attorneys.

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